

payments to low-income households from tax authorities to offset their home energy costs can be countable as cash resources/benefits—as long as Federal funds are not used to pay for these “credits” and payments, and they are not generally available to other households.)

Leveraging Issues Relating to Tribal Grantees

A number of leveraging issues relate specifically to Indian tribes and tribal organizations. These issues include countability of oil overcharge funds, resources obtained from trust lands, resources obtained from National Forests and Bureau of Land Management areas, and Public Law 93-638 funds. Several grantees have commented, formally in response to the January 1992 interim final rule, or informally, and asked questions concerning these issues. While researching these issues, we consulted with the Office of the General Counsel in HHS, the Office of the Solicitor and the Bureau of Land Management in the Department of the Interior, and the Office of the General Counsel and the Forest Service in the Department of Agriculture.

In addition, questions have been raised about the possibility of both a tribe and a State claiming the same leveraged resource.

The guidance that follows addresses these issues. We advised grantees of most of this guidance in LIHEAP Information Memorandum 92-19, dated June 25, 1992.

Oil Overcharge Funds

In accordance with Federal law, court orders, and agreements, the Department of Energy distributes petroleum violation escrow—PVE or oil overcharge—funds to States and territories, but not to Indian tribes or tribal organizations. In the preamble to the January 1992 interim final rule, we stated that, because oil overcharge funds are not distributed directly to tribes or tribal organizations, tribal LIHEAP grantees cannot count them under the LIHEAP leveraging incentive program. We noted that if a tribe receives PVE funds under a State LIHEAP program, the tribe would be a subgrantee or contractor of the State's program for the administration of these funds, and the funds would be used by the tribe as part of the State's LIHEAP program. Also, we noted that if a tribe and State agree that the tribe's direct Federal LIHEAP allotment is to be increased in lieu of the tribe receiving PVE funds under the State's LIHEAP program, the increased funds received by the tribe would be

regularly appropriated Federal LIHEAP funds, not PVE funds; the State would retain the actual PVE funds.

Several tribal grantees told us informally that they believe that tribes that obtain oil overcharge funds from the State(s) in which they are located and use these funds for home energy assistance should be able to count them under the leveraging incentive program, since the tribes in fact have leveraged those funds. Also, in its formal comments on the January 1992 preamble and interim rule, a State encouraged HHS “to allow tribes to offer as countable resources any oil overcharge funds [provided to them by the States in which they are located] that meet other criteria defined in the law” for countable leveraged resources.

After considering these comments, we determined that tribal LIHEAP grantees that receive oil overcharge funds from the State in which they are located (and/or interest the State earned on oil overcharge funds) and use these funds (and/or interest the tribes or tribal organizations earn on these funds) for home energy assistance (generally as subrecipients—subgrantees, contractors, or subcontractors—of the State) can count these funds under the leveraging program, as long as these funds meet all applicable statutory and regulatory requirements for countable leveraged resources, and the requirements in the following paragraphs.

If a tribe or tribal organization wants to count oil overcharge funds (and/or interest earned on oil overcharge funds) that it has used for home energy assistance as a subrecipient of the State, it must include with its leveraging report documentation or verification that (1) these particular oil overcharge funds (and/or the oil overcharge funds on which the interest was earned) were distributed by the Department of Energy to the State in which the tribal grantee is located after October 1, 1990, and (2) the State is not counting these particular funds as leveraged resources. A copy of a written statement from the State providing this information will meet this requirement. (As explained earlier in this preamble, consistent with the legislative history, the regulations require that countable PVE funds must be distributed by the Department of Energy after October 1, 1990. It is the State that knows when particular PVE distributions were made to it by DOE.)

In general, the criterion in §96.87(d)(2) of this final rule under which a tribe would count these funds is criterion (iii), where the resource is distributed under the tribe's LIHEAP plan and integrated with its LIHEAP program. (The tribe's LIHEAP program

did not develop or acquire these funds from vendors through negotiation, regulation, or competitive bid, as required under criterion (i).) Tribes should be sure to meet all of the requirements for criterion (iii) in order to claim these oil overcharge funds under this criterion. Also, for purposes of leveraging, when a tribe uses oil overcharge funds received from its State in accordance with the LIHEAP statute and regulations and the tribe's LIHEAP application, essentially as if they were regular Federal LIHEAP funds, then the tribe may count these oil overcharge funds under criterion (ii). (Because the tribe received the overcharge funds from the State, rather than from the Federal government, the tribe is accountable to the State for their use.)

On the other hand, we have determined that Federal funds added to tribal grantees' LIHEAP allotments, in lieu of overcharge funds, cannot be counted as leveraged resources, because of the statutory requirement that countable leveraged resources be from non-Federal sources. In this case, the State has retained the actual oil overcharge funds, and the increased funds awarded to the tribe by HHS are regularly appropriated Federal LIHEAP funds from the State's gross LIHEAP allotment.

Resources Obtained From Trust Land

Tribes may obtain home energy resources, such as wood used to heat low income households' homes, from tribal or individual trust land. These trust lands are not Federal lands. Therefore, resources obtained from these lands are countable under the LIHEAP leveraging incentive programs, as long as they meet all relevant statutory and regulatory requirements.

It is important to trace the source of a resource/benefit to its origin, to determine whether it is countable. For example, if a tribe cuts firewood from tribal trust land and gives that firewood to low-income households, the fair market value of the wood at the time of “donation” is countable. However, if a tribe uses Federal LIHEAP funds to purchase firewood cut from an individual's trust land at fair market value, the wood is not countable, because it was bought with Federal funds and there was no discount in its price. If a tribe uses Federal funds to purchase firewood from an individual's trust land at a discount, then the amount of the discount is countable, as long as all relevant statutory and regulatory requirements for leveraged resources are met. The amount actually paid is not countable, because Federal funds were used. (If a tribe uses non-